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No. 84-287

In the Supreme Court of the United States

OCTOBER TERM, 1984

LEROY STEWART, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in holding that his claim against the United States under the Federal Tort Claims Act was barred by provisions of the Colorado Workmen's Compensation Act.

1. This suit arises out of a traffic accident in the parking lot of the Rocky Flats nuclear weapons facility in Colorado. This facility is owned by the United States and operated by respondent Rockwell International Corporation (Rockwell). As petitioner was leaving his parked car on the way to work, he was injured by a government vehicle driven by respondent Gary Nuss, who was employed in the Rockwell Plant Protection Department. Pet. App. 34-36.

Petitioner filed suit in the United States District Court for the District of Colorado against the United States, Rockwell, and Nuss, alleging that the accident resulted

from their negligence. The district court granted summary judgment for Nuss and Rockwell, ruling that petitioner's injury arose "out of and in the course of his employment" within the meaning of the Colorado Workmen's Compensation Act (the Act), Colo. Rev. Stat. § 8-52-102(1)(c) (Supp. 1983), and that the Act constituted petitioner's exclusive remedy against his employer or a co-employee. Pet. App. 63-67. The government then moved that the claim against it be dismissed as well. The government argued that it was immune under the Act by virtue of its contract with Rockwell. Under that contract, Rockwell assumed the responsibility for managing, staffing, maintaining, and operating the plant (Pet. App. 37). The district court granted this motion and dismissed the claim (*id.* at 63-67).

The court of appeals affirmed (Pet. App. 26-61). The court agreed with the district court's determination that petitioner's accident arose in the course of his employment (*id.* at 40-46). Stating that this issue turned on whether petitioner's presence in the parking lot had been solely for his own benefit or for the mutual benefit of petitioner and his employer (*Brogger* v. *Kezer*, 626 P.2d 700 (Colo. App. 1980)), the court noted petitioner's deposition testimony that his supervisor expected him to be dressed and ready for work at 7:30 a.m., approximately 20 minutes after the time of his accident in the parking lot (Pet. App. 44-45). The court of appeals also observed (*ibid.*) that in considering a similar factual situation involving a parking lot accident prior to work, the Colorado Court of Appeals had held that the injury occurred within the scope of employment even though the benefit to the employer was slight. *Sieck* v. *Trueblood*, 29 Colo. App. 432, 485 P.2d 134 (1971).

The court of appeals then held (Pet. App. 46-53) that the claim against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, was barred by the Colorado Workmen's Compensation Act.

The court noted (Pet. App. 48) that the FTCA waives sovereign immunity for tort liability "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). See also 28 U.S.C. 2674. The court observed that one who contracts out work is deemed an employer under the Colorado Workmen's Compensation Act (Colo. Rev. Stat. § 8-48-101(1) (Supp. 1983)), that he is cloaked with a derivative immunity when the party to whom he contracts out work secures workers' compensation insurance (Colo. Rev. Stat. § 8-48-101(2)), and that alternatively, he may be liable in damages if the party to whom he contracts out work fails to procure such insurance (Pet. App. 48).[1]

Treating the dismissal of the claim against the government as the granting of summary judgment (Pet. App. 57 n.4), the court of appeals rejected "the argument that genuine issues of fact barred the dismissal as to the Government" (*id.* at 47). The court held (*id.* at 47-48) that

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[1]Section 8-48-101(1) provides in pertinent part:

> Any person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sublessee, contractor, or subcontractor, irrespective of the number of employees engaged in such work, shall be construed to be an employer. * * *

Section 8-48-101(2) provides:

> If said lessee, sublessee, contractor, or subcontractor is himself an employer in the doing of such work and, before commencing such work, insures and keeps insured his liability for compensation as provided in articles 40 to 54 of this title, neither said lessee, sublessee, contractor, or subcontractor, its employees, or its insurer shall have any right of contribution or action of any kind * * * against the person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof, or against its employees, servants, or agents.

"on the undisputed facts Colorado law, made applicable under the FTCA, afforded the Government immunity from this action as a 'statutory employer' since Rockwell, as required by its contract to perform work for the Government, obtained workmen's compensation insurance which covered [petitioner's] injury." The court rejected (Pet. App. 48-51) the contention that a trial was required to determine the government's precise role in running the plant since the undisputed facts placed the relationship within the scope of Section 8-48-101(1). The court also rejected the argument that the United States had not elected coverage under the Act, noting that the Act does not require such an election and that Rockwell obtained insurance as required by its contract with the government (Pet. App. 51). Finally, the court ruled (*id.* at 51-52) that, contrary to petitioner's contention, Congress had made clear that state workers' compensation statutes may apply on land owned by the federal government. 40 U.S.C. 290.

2. Petitioner's claim plainly does not warrant review by this Court. The decision below does not conflict with any decision of this Court or any other court of appeals and does not present any important issue of federal law. Moreover, the court of appeals' decision is clearly correct.

Petitioner contends (Pet. 11-16) that summary judgment should not have been granted and that the question of whether the accident occurred during the course of employment should have been set for trial. However, petitioner does not dispute the facts upon which the court of appeals concluded that his use of the parking lot was for the mutual benefit of employer and employee; he does not indicate what new relevant facts might be adduced at a trial; nor does he explain how the court of appeals erred in its interpretation of the relevant Colorado case law. Instead, petitioner merely cites propositions recognized and discussed by the court of appeals en route to its conclusion. The lower

courts' resolution of this fact-bound issue does not warrant further review.

Petitioner also contends (Pet. 16-24) that the lower courts erred in holding that the Colorado Workmen's Compensation Act applies to the United States in the situation here. Petitioner appears to argue (Pet. 17-19, 22-24) that there were material issues of fact regarding the precise nature of the relationship between the government, on the one hand, and Rockwell and its employees, on the other. However, as the court of appeals declared, "*whatever* characterization [petitioner] appends to the United States-Rockwell relationship, we are persuaded that the statutory employer immunity bars his suit under Colorado law" (Pet. App. 52) (emphasis added). Colorado case law leaves no doubt that this ruling is correct. See *Faith Realty & Development Co.* v. *Industrial Commission*, 170 Colo. 215, 460 P.2d 228, 230 (1969) ("The [workmen's compensation] statute is intended to cover every business conducted by one through the activities of another under any kind of a contract.").

Finally, petitioner argues (Pet. 19-20) that the Colorado Workmen's Compensation Act does not apply on federal property, especially since no Colorado statute provides for such application. However, 40 U.S.C. 290 unequivocally provides that the states are free to apply their workers' compensation law on federal property.[2] Moreover, it has

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[2]40 U.S.C. 290 provides in pertinent part:

> Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America * * *.

Petitioner cites two cases (Pet. App. 18) that he suggests create "confusion" concerning the meaning of this statute. Petitioner does not

long been recognized that a state legislature need not take any special action in order to take advantage of this statute. *Wallach* v. *Lieberman*, 366 F.2d 254, 258 (2d Cir. 1966); *Capetola* v. *Barclay White Co.*, 139 F.2d 556, 559 (3d Cir. 1943), cert. denied, 321 U.S. 799 (1944); *Prescott* v. *United States*, 523 F. Supp. 918, 930 (D. Nev. 1981), aff'd, 731 F.2d 1388 (9th Cir. 1984). Since the Colorado statute applies to the facts of this case, the circumstance that the accident occurred on federal property is of no consequence.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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explain what "confusion" he finds in these cases. In any event, it is clear that neither case supports petitioner's argument that a state workers' compensation statute may not apply on federally owned property. In *Roelofs* v. *United States*, 501 F.2d 87 (5th Cir. 1974), cert. denied, 423 U.S. 830 (1975), the court noted that 40 U.S.C. 290 did not impose an obligation on the government to obtain Louisiana compensation insurance but ruled that the government was nevertheless immune as a "statutory employer" under Louisiana law. In *Peak* v. *Small Business Administration*, 660 F.2d 375 (8th Cir. 1981), the court held that an employee's claim against the Small Business Administration for a workers' compensation award as "statutory employer" could not be brought under the "sue and be sued" section of the Small Business Act, 15 U.S.C. 634(b)(1), but instead fell under the FTCA.

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